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No. 95-375

In The

Supreme Court of the United States

October Term, 1995

THE CITY OF CHARLESTON and THE CITY OF SOUTH CHARLESTON,

Petitioners,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA; BOYCE GRIFFITH, Chairman; OTIS D. CASTO, Commissioner; RICHARD D. FRUM, Commissioner,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did a 1990 Act of the West Virginia Legislature and 1992 orders of the Public Service Commission of West Virginia, a state regulatory agency responsible for regulating the practices and services of public utilities, violate the Contract Clause concerning contracts between the City Petitioners, public utilities that provide sewer service, and their bondholder?

2. Was it appropriate for the Fourth Circuit to direct summary judgment for the Respondent, Public Service Commission?

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The Respondents, Public Service Commission of West Virginia, Boyce Griffith, Chairman, Otis D. Casto, Commissioner, and Richard D. Frum, Commissioner, (the "Public Service Commission" or "PSC" or "Commission") respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Fourth Circuit's opinion below, *City of Charleston v. Public Service Commission*, 57 F.3d 385 (4th Cir. 1995) and reprinted in the petition for certiorari at Appendix A.

STATEMENT OF THE CASE

The sewage collection and treatment operations of the City of Charleston and the City of South Charleston, (the "Petitioners" or "Cities") acting through their sanitary boards, constitute a public utility service which is subject to the regulation of the Commission. *West Virginia Code* §§24-1-1 and 24-2-1. Such regulation of the practices and services of the Cities has existed since the inception of the sewer systems.[1]

In order to fund improvements to their sewer collection and treatment facilities, the Cities enacted certain bond ordinances to enable the issuance of bonds. These ordinances have been held to be contracts. All of the ordinance contracts which contain language dealing with the collection of delinquent sewer bills, which includes the denial and termination of service, specifically acknowledge that such activities are subject to legislative and regulatory oversight. The contracts provide for such activities "to the full extent permitted or authorized by the laws of the State, and the Rules and Regulations of the PSC."

In 1989, the West Virginia Legislature ("Legislature") amended *West Virginia Code* §8-18-23 to allow sewer utilities, such as the Cities, to insist upon the termination of water service, when the water service was provided by a utility other than the sewer utility, to customers with a delinquent sewer bill. By the amendment, the Legislature provided the Cities with an extremely important mechanism to assist in the collection of their delinquent sewer bills. In 1989, shortly after the Legislature's action, both South Charleston and Charleston entered into contracts with West Virginia-

[1]The West Virginia Supreme Court of Appeals has recognized the authority of the Public Service Commission to regulate the utility practices and services of municipalities since at least 1914 regardless of contractual arrangements entered into by the utility. See, *City of Benwood, et al. v. Public Service Commission*, 75 W.Va. 127, 83 S.E. 295 (1914).

American Water Company ("West Virginia-American"), which were approved by the PSC in 1989, that requires West Virginia-American, upon the Cities' demand, to terminate water service because of delinquent sewer bills. West Virginia-American is the utility providing water service within the Cities' service territories. The effect of the 1989 legislation and its impact upon the ability of the Cities to collect their accounts receivable was analyzed by the PSC and submitted in its summary judgment affidavits. One of those affidavits is attached as Appendix B. Contrary to the assertion of the Cities, this analysis was not concerned with only the overall financial condition of the Cities. The evidence was submitted to illustrate the effectiveness of the alternative remedy provided to the Cities in collecting certain bills. As noted by the Fourth Circuit, the undisputed evidence shows that following enactment of the legislation, revenues increased and accounts receivable decreased. 57 F.3d at 394.

A year later, in 1990, the Legislature again amended *West Virginia Code* §8-18-23 by removing the provisions allowing liens to be placed on premises occupied by tenants who were sewer customers with delinquent sewer bills. The legislation also removed the property owner responsibility for delinquent sewer bills incurred by tenants.[2] The result of the 1990 amendment is that the person who contracts for the utility service should be responsible for its payment.

In 1990 and 1991, the Commission received numerous formal complaints by landlords and tenants against the Sanitary Board of the City of Charleston ("Charleston")[3]. The complaints alleged that contrary to the 1990 legislative

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[2]If property owners contract directly with the Cities for sewer service, they remain responsible for the payment of bills.

[3]The Complaints were filed pursuant to *West Virginia Code* §24-4-6. *West Virginia Code* §24-2-2 directs the Public Sewer Commission to require public utilities to conform to the laws of the State and to the Rules and Regulations of the Commission. Following the PCS's investigation, *West Virginia Code* §24-2-7 allows the Commission to fix reasonable practices to be followed by the public utility in lieu of those found to be unreasonable or discriminatory.

action, Charleston was still holding landlords financially responsible for the delinquent sewer bills incurred by tenants. In one of the cases, service was terminated to a landlord because of a prior tenant's delinquent sewer bill. The tenants complained that the Charleston was denying service to tenants solely because of an outstanding delinquent sewer bill incurred by another.[4]

On March 30, 1992, the Commission issued two orders in the consolidated formal complaint cases. *Copley v. Charleston Sanitary Board*, PSC Case No. 90-518-S-C, and *Moore, et al. v. Charleston Sanitary Board*, PSC Case No. 91-120-S-C, et al. The Commission's orders held that the 1990 amendment to West Virginia Code 8-18-23 ended property owner responsibility for delinquent sewer bills unless the property owners had directly contracted for the service. This was nothing more than a restatement of what the Legislature had provided in 1990 when it amended the Code section. Furthermore, applying Commission rules and regulations and applicable State law, the Commission determined that the City could not deny sewer service to tenants that applied for service or terminate service to tenants who had no connection with the previous delinquency. This holding was based on long established policy incorporated in rules and regulations of the Commission which has been uniformly applied to all providers of utility service. The applicable rule is attached as Appendix A. To deny utility service to tenants would constitute a discriminatory practice prohibited by *West Virginia Code* §24-3-1. Furthermore, the denial of essential utility service to innocent third parties, because of another's delinquent bill, is manifestly unreasonable and discriminatory. *West Virginia Code* §24-3-1.

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[4]The Petitioner, The City of South Charleston, was not a party to the complaints filed at the PSC.

In the *Copley* case, filed August 1990, the issue before the Commission was not the lien provisions of *West Virginia Code* §8-18-23 (as alleged by the Cities) but whether utility service had been wrongfully terminated to a landlord. The landlord's service was terminated because of delinquent sewer bills owed by previous tenants of his property. The Commission rejected Charleston's argument that *West Virginia Code* §16-13-16 gave the Sanitary Board the right to terminate the landlord's service. The Commission found that *West Virginia Code* §16-13-16 only applied to municipals that provided both water and sewer service, not municipals, like Charleston, that provide only sewer service. Similarly, the Commission rejected Charleston's arguments that *West Virginia Code* §8-20-10 allowed the termination of sewer service because that *Code* provision also only applied to municipals with combined water and sewer systems. The Commission found that the provisions of *West Virginia Code* §8-18-23(a) would allow termination of service to delinquent *users* (who were the customers, the tenants) not termination of service to property owners.

Finally, the Commission held that Rule 4.08 of its *Rules and Regulations for the Government of Water Utilities*, 150 CSR 7, Rule 4.8.3., prevented the termination of service to the landlord because the rule provides that a delinquency in payment for service by a previous occupant is insufficient cause for refusing, denying or discontinuing service unless the new customer was a member of the same household.[5]

The *Moore* case represented consolidated complaints by both landlords and tenants which presented the issues of whether landlords could be held responsible for the debt of a tenant and whether utility service could be denied to tenants and landlords because of a delinquent

[5]The relevant portion of Rule 4.08 appears in Appendix A to this brief.

sewer bill incurred by another. The Commission held that the provisions of *West Virginia Code* §8-18-23 prohibited Charleston from holding the property owner liable for tenants' delinquent service bills, unless the landlords had contracted with the Sanitary Board for the service which was provided. This finding is the literal interpretation of the 1990 legislation.

The Commission found that denial of service to landlords and tenants because of delinquencies of former occupants was contrary not only to the express provisions of *West Virginia Code* §8-18-23(a) but also Rule 4.08 of the *Rules and Regulations for the Government of Water Utilities* (like the *Copley* decision).

Finally, the Commission rejected Charleston's argument that the Commission's findings concerning denial of service to landlords and tenants unconstitutionally impaired Charleston's bond contracts. The Commission emphasized that Charleston's denial of service was a utility practice which was properly regulated by the Commission. The Commission found Charleston's practice to be contrary to the express provisions of *West Virginia Code* §8-18-23 and Rule 4.08 of the Commission's *Rules and Regulations for the Government of Water Utilities* and to constitute an undue burden to citizens seeking to rent apartments within Charleston. In other words, the PSC was regulating utility practices, not provisions of a contract, which regulation is contemplated and acknowledged by the express terms of the contracts in this case. Thus when Petitioners complain that the contemplated regulation never extended to municipal bond covenants, they are mischaracterizing the nature of the regulation. Neither the state nor the PSC has undertaken to regulate the Cities' contracts or covenants. The State has undertaken to establish policy throughout the State by enactment of the statute and the PSC has undertaken to regulate a utility's practices and services to its customers.

West Virginia Code §24-5-1 provides the procedure for judicial review of orders of the Commission. Pursuant to that section, the City of Charleston could have appealed the *Copley* and *Moore* orders to the West Virginia Supreme Court of Appeals. Charleston did not file an appeal of the Commission's orders with the State Supreme Court.

Instead of appealing to the State Supreme Court, the Cities filed their complaint in Federal District Court on February 24, 1993 alleging that the 1990 legislation and the 1992 orders violated the Contracts Clause to the State and Federal Constitutions. Acting pursuant to the District Court's procedural order, both the Cities and the Public Service Commission filed motions for summary judgment. The District Court granted judgment in favor of the Cities and found that the 1990 Legislation and the 1992 orders of the Commission violated the Contract Clause to the Federal and State constitutions.

On review, the Fourth Circuit reversed and remanded the case to the District Court for entry of summary judgment in favor of the Public Service Commission. The Fourth Circuit found that if the bond contracts were impaired at all, that impairment was clearly insubstantial and there was no violation of the Contract Clause. 57 F.3d at 395.

SUMMARY OF ARGUMENT

There are no pressing or unresolved legal issues in this case. The Fourth Circuit applied appropriate legal standards in analyzing the Contract Clause issue. Furthermore, the Fourth Circuit appropriately directed summary judgment in favor of the Public Service Commission. Finally, regardless of the impairment issue, there exist other legal reasons justifying judgment in favor of the Public Service Commission. The decision of the Fourth Circuit is plainly right.

ARGUMENT

I. THE FOURTH CIRCUIT CORRECTLY APPLIED THE LAW IN CONSIDERING THE IMPAIRMENT QUESTION.

The Fourth Circuit correctly analyzed the contract impairment issue in this case. The three-part analysis for determining violations of the Contract Clause is well-founded in the case law. Initially the court must determine whether or not the state law has, in fact, impaired any contract. If so, the court must then determine whether the contract was "substantially impaired". And if substantially impaired, the court must determine "whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers". 57 F.3d at 390-391. The public/private argument necessitating a heightened review, contained in the Cities' Petition, pertains to the third prong of the test (and the deference to be afforded to the Legislature) which is not reached unless substantial impairment is found, which it was not. As evidenced by the argument in the Petition, the Petitioners are inviting the Court to leapfrog past the first two parts of the analysis (whether there is impairment and whether the impairment is substantial) and resolve this case on the basis of the legislative purposes. Additionally, the Petitioners' reliance on *Trust* is inappropriate for reasons hereinafter discussed.

As noted by the Fourth Circuit, there is a significant question as to whether the 1990 legislation constituted any impairment since the contracts contained express language whereby the Cities covenanted only to enforce and collect charges "to the full extent permitted or authorized by the laws of the State, and the rules and regulations of the PSC". *Id.* at 391.

Municipal sewer systems are public utilities and, as such, are subject to the jurisdiction and regulation of the

Public Service Commission. The preeminent power of the PSC to regulate the practices and services of municipal systems has been recognized by the Supreme Court of Appeals of West Virginia since almost the beginning of this century to the present. E.g. *Benwood v. Public Service Commission*, 83 S.E. 295 (W.Va. 1914); *City of Charleston v. Public Service Commission*, 103 S.E. 673 (W.Va. 1920); *State v. Renick*, 116 S.E.2d 763 (W.Va. 1960); *Delardes v. Morgantown Water Commission*, 137 S.E.2d 426 (W.Va. 1964). Contrary to the statement of the Cities in their Petition, these cases were not limited to rate issues but also deal with utility practices.

In the face of the express language of the contracts and the pervasive regulation of the Cities' sewer systems as public utilities, the Fourth Circuit could have held that there was no impairment to the contracts. Instead the Fourth Circuit assumed the Cities' contracts had been impaired and analyzed whether such impairment was substantial.

There is no objective evidence of reliance. The Cities submitted an affidavit of an officer of the Water Development Authority that it expected the Cities to place liens and enforce liens for unpaid sewer charges. The Water Development Authority is a state agency created by the West Virginia Legislature to buy the bonds of public sewer systems like the Cities. *West Virginia Code* §22C-1-1 *et seq.* The Fourth Circuit has appropriately discredited this affidavit. *Id.*, p. 392, fn. 9. This conclusory affidavit is obviously self-serving and is contradicted by the objective provisions of the contracts which expressly acknowledge that the Cities covenant to collect charges to the extent permitted by State law and the rules and regulations of the Public Service Commission. Furthermore, the Cities have never foreclosed on a landlord lien. *See*, Appendix B.

The Fourth Circuit correctly held that the PSC's regulation was pervasive and there was no reason to

believe the regulation would cease. Furthermore, the Fourth Circuit appropriately determined the statute and the PSC orders do not undertake to alter the terms of the contract. Instead they impose generally applicable State policy, concerning when liens can be placed on property and when services can be terminated or denied. *Id.*, p. 393, fn. 10.

The Fourth Circuit correctly found the lien provision to be a remedy and that a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the terms of an agreement. Finally, the Court correctly found that the lien provision did not constitute a central undertaking of the parties, and that, in any event, the Legislature had in 1989 provided the Cities with a far more effective means of collecting sewer bills by allowing for the termination of water service.

Following a complete and appropriate legal analysis, the Fourth Circuit correctly held that if there was impairment, it was clearly insubstantial.

In their Petition, the Petitioners urge this Court to grant review "in a time of some uncertainty in the municipal bond market". There is no evidence offered about such uncertainty either as a general concept or as a specific fact of significance in this case.

II. THERE IS NO CONFLICT OF LAW AS A RESULT OF THE DECISION.

The Cities have erroneously stated that the facts before the Court are essentially the same as those found in *United States Trust v. New Jersey*, 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505, *reh'g. denied* 431 U.S. 975, 53 L.Ed.2d 1073, 97 S.Ct. 2942 (1977) and that *United States Trust* should be dispositive of this case. However, *United States Trust* is clearly distinguishable from the instant matter. In *United States Trust*, the States of New Jersey and New York passed legislation in which they specifically covenanted

and agreed with certain bondholders to provide security for their bonds. The statute at issue stated:

> "The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, . . . neither the States nor the port authority nor any other subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth." 1962 NJ Laws, c 8, §6, 1962 NY Laws c 209, §6. *Id.* at 10.

It can be stated in no clearer manner that the States were entering into, and were themselves parties to, a contract with the bondholders.

Clearly, the pivotal fact in *United States Trust* was that the State itself had entered into a contract and then unilaterally changed the terms of the contract to benefit itself. Because of this self-interest of the State, the Court held New Jersey to a higher standard in analyzing whether its legislative action had, in fact, impaired the contract at issue. Specifically, the Court stated as follows:

> "The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate

> because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at 25-26 [footnotes omitted]

The key element of State self-interest does not exist in the instant case. The State simply is not and never has been a party to the bond agreements. The Public Service Commission is not a party to the contract. Only the City of Charleston and the City of South Charleston and the bondholders who executed the agreements are obligated to perform under the agreements and benefit from the agreements. The action of the Legislature in eliminating landlord liens will in no way enrich the State, it will in no way relieve any burden of the State and it will in no way provide even a nebulous convenience to the State. In eliminating landlord liens, the Legislature has simply established general policy applicable throughout the State.

Accordingly, all discussion by the Cities regarding the heightened standard to be applied by the Court in instances where the State is a party to the contract is not appropriate. That standard would only be material if the Cities had themselves passed ordinances which impaired their agreements with the bondholders and the bondholders then sued the Cities. Furthermore, nowhere has the Court stated that municipal bond contracts themselves are entitled to a higher level of scrutiny than other contracts, although the Cities assert as much repeatedly in their brief. The heightened scrutiny found in *United States Trust* is, again, applicable only to contracts in which the State is a party and only where substantial impairment has been found.

Even if one were to assume different facts in this case, specifically that the State of West Virginia and the bondholders had entered into these agreements, the Cities' contract clause challenge must fail under the *United States Trust* analysis.

In the *United States Trust* decision, the Court discussed the question of valuation of the financial loss to the bondholders as a result of eliminating the security provision from the bonds. In that discussion, the Court stated that the question of valuation need not be resolved because the State had made no effort to compensate the bondholders for any loss sustained as a result of its action. The Court further noted that the security covenant was not merely modified or replaced by an arguably comparable security provision. *United States Trust*, 431 U.S. at 19. It was, instead, outrightly repealed.

In the instant case, however, it is clear that the landlord lien provision was replaced by a far superior legislated provision. As previously noted, prior to the elimination of the landlord liens, the Legislature provided the Cities with the ability to terminate water service when sewer bills were delinquent. Accordingly, under a *United States Trust* analysis, any impairment to these contracts must be valuated in light of the fact that a more favorable provision to collect delinquent bills was given to the Cities. In this context, it is clear from the undisputed affidavits of the PSC that there has been no substantial impairment. There is also no merit to the Cities' assertion that the termination of water service should not be considered a comparable security provision because such provision was provided by the Legislature before the removal of the landlord lien. The timing of the replacement security provision is irrelevant to the question of whether the provision is comparable. The *United States Trust* Court, if faced with the fact in this case, would clearly have reached a different result.

Finally, the municipal bond cases which were alluded to in *United States Trust* decision and by the Cities do not concern the procedures by which revenues are collected, as in the instant case. Instead, those cases concern liens which are the only means available to bondholders to secure their investment. The cases generally arise in instances where there has been a default on the bonds and the bondholder is attempting to enforce its rights. When the bondholder attempts to foreclose upon its lien, it finds that the State has taken some action which undermines the lien itself. This impairs the basic obligation of the bond contracts.

These facts are clearly not analogous to the instant case. The Legislature has done nothing which diverts or in any other manner impairs the revenues of the sewer system so that the bond obligations cannot be met. Furthermore, if the Cities were to default on these obligations for some reason, nothing has been done which would interfere with the bondholder's enforcement of their rights under the bond agreements. In *United States Trust*, the Legislature diverted *revenues* which placed in jeopardy the repayment of the bond obligations. In the instant case, the Legislature only modified the means by which certain delinquent bills could be collected, i.e., through water termination rather than landlord liens.

The Petitioners cite various decisions in their Petition as evidencing a conflict among circuits and with State supreme courts. There is no such conflict. Among other distinctions, there is no indication in those cases that the subject entities' practices and services were as pervasively regulated by the State as the Cities' practices and services. Nor is there any indication that those cases involved contracts that expressly acknowledged such regulation. The cases relied upon by the Petitioners can also be distinguished as follows.

The Fourth Circuit Court of Appeals addressed a Contract Clause claim in *Baltimore Teachers Union v. Mayor,*

etc. of Baltimore, 6 F.3d 1012 (4th Cir. 1993), *reh'g. denied*, *cert. denied*, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994), a case in which the Fourth Circuit reversed the determination of the District Court that a Contract Clause impairment had occurred. The Court found substantial impairment but determined that the City had exercised its power for a legitimate purpose. Baltimore City enacted a plan to reduce employee salaries which had been established in a contract between the City and the employees. The Court stated that "technical" impairments do not necessarily rise to the level of constitutional violation, while at the same time there is no requirement of total repudiation of the contract to find impairment. *Id.* at p. 1017. The Court determined that an impairment is substantial at least where the right abridged is one that induced the parties to contract in the first place and one in which there had been especial reliance. *Id.* at p. 1018. In the instant matter, the alleged impairment to the contract is only a modification of one means by which the Cities could possibly collect certain delinquent bills and, further, the Legislature provided the Cities with a more efficient means of collecting bills in the process. This legislative action is not comparable to the legislative action taken in *Baltimore*.

In *Continental Ill. Nat. Bank, etc. v. State of Washington*, 696 F.2d 692 (9th Cir. 1983), *appeal dismissed*, 460 U.S. 1077, 103 S.Ct. 1762, 76 L.Ed.2d 338 (1983), *reh'g. denied* 461 U.S. 950, 103 S.Ct. 2130, 77 L.Ed.2d 1309 (1983), the Court addressed the impairment of certain contracts entered into between a state agency, which was created to finance and build electric generation facilities, and bondholders and a federal agency. The Washington Legislature had enacted a statute which limited the ability of the state agency, WPPSS, to issue bonds to finance the construction of the power plants. The *Continental* Court stated that if the contracts involved had allowed for alteration, the legislation would not have substantially impaired the agreements. *Id.* at 697-98.

It is clear that in the instant case the bond agreements between the Cities and the bondholders do, in fact, anticipate that the collection of delinquent charges, which is the basic issue in this case, will be performed in compliance with the laws of the State of West Virginia and the Rules and Regulations of the Public Service Commission. Thus, the *Continental* Court would have reached a different conclusion if presented with the subject facts.

Furthermore, the *Continental* Court stated that it had looked to the central aspect of the agreements, the ability of WPPSS to issue more bonds, to determine whether there was an impairment. Since WPPSS could not issue more bonds, it could not complete construction of the plants. Id. at 698. Obviously, the State legislation before this Court does not limit the Cities' ability to issue bonds or generate revenue. Furthermore, the evidence indicates that the Legislature has improved the Cities' ability to collect revenues.

In *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir. 1994), *cert. denied*. 115 S.Ct. 613, 130 L.Ed.2d 522 (1994), the Court found that the franchisees could not reasonably be said to have had a fair and appreciable warning of an impending intervention into their agreements as a result of State regulation, because the industry had not previously been regulated in the manner that the Legislature was now attempting to impose. This is, of course, the antithesis of the instant matter, where the regulation of sewer service has been heavily regulated by the State since 1914.

The Petitioners cite *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223 (9th Cir. 1990), *cert. denied*, 498 U.S. 999, 111 S.Ct. 558, 112 L.Ed.2d 565 (1990), as support for their contention that the Fourth Circuit's decision conflicts with other Circuits. Such is not the case. Nevada involved the enactment of a state statute for the

purpose of eliminating the right of public employees to withdraw pension contributions (they made into the state plan) without penalty. The State agreed that the State's public employees' retirement system created contractual rights between the State and the non-vested employees. The State conceded that *United States Trust* controlled the outcome of the case because the State was a party to the contract. Again, in the subject case, the State is not a party to the Cities' contracts. Furthermore, the State has no self-serving interest in the contract. Nor, has the State taken any action which has impaired the rights of bondholders.

In *New Jersey Highway Authority v. Sills*, 109 N.J. Super, 424, 263 A.2d 498 (Ch. Div. 1970), supp. opinion, 111 N.J. Super, 313, 268 A.2d 308 (Ch. Div. 1970), affirmed p.c.o.b., 58 N.J. 432, 278 A.2d 489 (1971), a statue was enacted exempting certain classes of customers from payment of turnpike tolls. The Court found that this statute impaired the bond contracts because it resulted in a direct loss of revenue, although the loss was *de minimus*. This, of course, is not analogous to the instant situation. No action has been taken by the Legislature which exempts any class of customers from paying their sewer bill. The action taken by the Legislature simply modified one methodology by which the Cities could collect certain delinquent sewer bills. There is no taking of revenue, simply a change in procedure or remedy. In fact, revenue collection has been enhanced.

By the same token, in *Patterson v. Carey*, 41 N.Y.2d 714, 363 N.E.2d 1146 (1977), a statute which rescinded a toll road increase was found to be an unconstitutional impairment of a bond contract. Again, the Court noted that this statute resulted in a loss of revenue, although a *de minimus* loss, and stated that since the toll was the sole source of funds for bond repayment, limitation on the power to collect a toll would deprive the bondholders of an essential attribute of their contract. Once again, in

the instant matter, there has been no reduction of revenue, i.e., the Legislature has not required the Cities to charge less for their sewer service. There has instead been only a modification of the process used by the Cities to collect their revenues and, as has been noted numerous times, this modification, in fact, resulted in a superior methodology for collecting revenues.

Caritas Services, Inc. v. Department of Social and Health Services, 123 Wash.2d 391, 869 P.2d 28 (1994), is also clearly distinguishable from the instant matter because in that case, the State was, as in *United States Trust*, a party to the contract. The Court determined that in an instance where the State itself is a party to the contract, the expectations defined by heavy regulation did not, and could not, include the expectation that the State would retroactively abrogate its own contracts. The Court stated that whether a party enters into a contract in a heavily regulated area or not, the State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend money for the public good rather than the private welfare of its creditors. In the instant case, of course, the State is not a party to the contract and the legislative action taken in no way involves the State's refusal to meet its financial obligations. Since the State has no financial obligations under these bond ordinances, *Caritas* is simply not applicable.

George D. Hardin v. The Village of Mount Prospect, 99 Ill. 2d 96, 457 N.E.2d 429 (1983) involved a challenge by special assessment bondholders to a state statute that allowed for the cancellation of a bond after payment had been delinquent for thirty years and allowed the city to use money it held for the payment of such bonds for any city purpose. The Court found the statute to constitute an unconstitutional impairment. Instead of being the "minor modification" claimed in the Cities' Petition in this case, the statute obviously provided for the total destruction of the bond obligations. Like many of the cases cited by the Petitioners, the State was diverting

revenues from the bondholder to other purposes. Again, that is simply not the situation in the instant case.

In conclusion, the Fourth Circuit appropriately applied its legal analysis of the impairment question. There is no conflict with existing precedent which warrants this Court's review.

III. THE FOURTH CIRCUIT PROPERLY APPLIED THE LAW IN ANALYZING THE MOTIONS FOR SUMMARY JUDGMENT.

The District Court issued an order establishing dates by which parties could file motions for summary judgment; the nonmovant could respond in opposition; and, the movant could file a final reply. Pursuant to that procedure, both the Cities and the PSC filed motions for summary judgment. The Cities did not file opposing affidavits or otherwise indicate that there were material issues of fact which required a hearing in response to the PSC's motion for summary judgment.

Although, in the abstract, Petitioners are correct when they assert that inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, there are no inferences to be drawn from the underlying facts in this case. Again, the Cities did not file opposing affidavits to the PSC's affidavits. The affidavits contained in the Appendix to the Cities' Petition were filed with their motion for summary judgment. The problems with the Cities' affidavit from the Water Development Authority in support of their motion for summary judgment have been previously discussed. The statistics regarding the percentage of delinquent accounts in relationship to rental property, contained in Charleston's affidavit of Mr. Collison, are meaningless in resolving the impairment issue, as in the remainder of his affidavit. The bottom line is that there is no genuine issue as to any material facts in this case.

The fundamental standard applicable to motions for summary judgment under Rule 56 of the *Federal Rules of Civil Procedure* is to be found in the Rule itself. A motion for summary judgment *must* be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), F.R.C.P. Although Rule 56 has been part and parcel of Federal practice and procedure for a number of years, the interpretation and application of the Rule has been significantly defined by a trilogy of landmark decisions which the United States Supreme Court handed down in 1986. *See Matsushita Elec. Co. v. Zenith Radio*, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986).

Under the standard clearly articulated in the *Matsushita*, *Anderson* and *Celotex* cases, a movant for summary judgment under Rule 56 bears the initial burden "of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, *quoting* Rule 56(c), F.R.C.P.

When a movant satisfies its threshold burden, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. *See also*, *Celotex*, 477 U.S. at 323-24. A non-movant must go beyond the pleadings and present evidence of a genuine issue for trial. *Matsushita*, 475 U.S. at 587, *citing* Rule 56(e), F.R.C.P. The *Anderson* Court strongly emphasized the significance of the words "genuine" and "material" as set forth in Rule 56(c):

> "By its very terms, this standard [Rule 56(c)] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 247-248.

In other words, evidence presented by the non-movant must be of sufficient "caliber or quantity" that a finder of fact would be able to conclude that the non-movant has established each element of its claim by a preponderance of the evidence or by any other standard which may apply. *Id.* at 254. Moreover, summary judgment is mandated under the Rule where a party who bears the ultimate proof "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322. "[T]here can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 323.

Conclusory and accusatory statements, even if set forth in affidavit or deposition testimony, are completely inadequate to resist a motion for summary judgment:

> "Neither conclusionary allegations nor general denials perpetuate an issue of fact under Rule 56, and if such undisputed facts effectively pierce the sham of false generality of claims, the case is ripe for summary disposition."

John Hopkins University v. Hutton, 297 F.Supp. 1165, 1201 (Dist. of Md. 1968), *rev'd. in part, aff'd in relevant part*, 422 F.2d 1124 (4th Cir. 1970), (*quoting Bumgarner v. Joe Brown Company, Inc.*, 376 F.2d 749, 750 (10th Cir. 1967), *cert. denied*, 389 U.S. 831, 19 L.Ed.2d 90, 88 S.Ct. 99 (1967)).

One of the principal purposes underlying Rule 56 is to weed out claims which are factually unsupported. *See Pocahontas Supreme Coal Co. v. Bethlehem Steel*, 828 F.2d 211 (4th Cir. 1987). As stated by the *Celotex* Court, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trail." *M&M Medical Suppliers v. Pleasant Valley Hospital*, 981 F.2d 160, 163 (4th Cir. 1992) (*quoting Celotex*, 477 U.S. at 322).

In this case, the Cities were required to prove that their contracts have been unconstitutionally impaired. They have submitted no evidence of impairment. Instead, they have relied on the argument, without factual support, that since the 1990 Legislation removed the lien landlord provisions, it must be concluded that their contracts have been substantially impaired. However, this approach is inconsistent with the legal standards for evaluating Contracts Clause cases.

As herein discussed, it must first be demonstrated that the lien provision is an "obligation of the contract." Assuming *arguendo* that the lien provision is an obligation of the contract, the Cities must show that there has been substantial impairment of the obligation of the contract. They have made no such showing. The Public Service Commission was the only party to perform a financial analysis of the effect of eliminating the lien provision. That analysis concludes that there has been no negative effect. In fact, the Commission's analysis shows that the

effect of the 1989 and 1990 Legislative amendments have improved the Cities' ability to collect delinquent bills. That analysis was not factually disputed.

The Cities have failed to meet their burden of proof. Their motion for summary judgment was properly denied and the Commission's Motion for Summary Judgment was properly granted.

IV. THE COMPLAINT COULD HAVE BEEN PROPERLY DISMISSED NOTWITHSTANDING THE IMPAIRMENT ISSUE.

As indicated by the Fourth Circuit in its decision, because it disposed of the merits of the impairment claim, it was unnecessary for the Court to address the following other dispositive matters raised by the Public Service Commission.

a) The Public Service Commission argued that the Cities lacked standing to bring the suit. Although the Fourth Circuit addressed this issue without deciding it from the perspective of whether a city could sue its creator State, the Public Service Commission asserted and argued that there was no jurisdiction under Article III of the United States Constitution because there was no showing of actual or threatened injury to the Cities as a result of alleged State action. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982).

b) The Public Service Commission asserted that the Cities were barred from asserting their claim under the West Virginia statute of limitations which required them to file their federal court suit within two years of the effective date of the 1990 legislation, which was June 9, 1992. Since the Cities did not file their complaint until February 24, 1993, their action was barred.

c) Although the Cities could have appealed the 1992 orders of the PSC directly to the State Supreme Court, they did not The principles of res judicata and collateral estoppel bar the subsequent suit in Federal District Court.

CONCLUSION

The Petition for Certiorari should be denied. The Fourth Circuit committed no legal or factual error in ruling on the impairment issue and this case presents no issue appropriate for the Court's review.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 4.08 of the Commission's Rules and Regulations for the Government of Water Utilities, 150 CSR 7, Rule 4.8.3.

4.8.3. Insufficient reasons for disconnecting service—The following shall not constitute sufficient cause for refusing, denying or discontinuing service to an applicant or present customer:

Delinquency in payment for service by a previous occupant of the premises to be served other than a member of the same household.

APPENDIX B

IN THE UNITED STATE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

THE CITY OF CHARLESTON, and THE CITY OF SOUTH CHARLESTON, *Plaintiffs,* v. THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA; BOYCE GRIFFITH, Chairman; OTIS D. CASTO, Commissioner; and RICHARD D. FRUM, Commissioner, *Defendants.*	CIVIL ACTION NO. 2:93-0161

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, To-Wit:

SECOND AFFIDAVIT OF BIRDIE GANDY, CPA

I, Birdie Gandy, after being first duly sworn do depose and say that:

I have reviewed the Affidavits of William B. Collison and Annette Hancock filed in this matter by the Plaintiffs as attachments to the Plaintiff's Motion for Summary Judgment. Having reviewed these affidavits, I am of the opinion that the statistics found therein regarding the number of delinquent accounts for the City of Charleston and the City of South Charleston and the character of these accounts, i.e., rental property or owner-occupied property, are irrelevant to the matters presently before the Court. These statistics do not show that the Cities' ability to meet their bond obligations has been in any way negatively affected by the elimination of landlord liens. To the contrary, as stated in my initial Affidavit filed in this matter, the Cities collection of revenues has, in fact, improved since the elimination of the landlord liens. According to the information presented by the Plaintiffs, neither the City of Charleston nor the City of South Charleston has ever foreclosed on a landlord lien even when permitted to place such liens upon property as a result of tenants' failure to pay sewer bills. Clearly, the placement of liens is not an effective means by which to collect delinquent sewer bills. The termination of water service, however, is an extremely effective tool for use by the utilities in the collection of delinquent bills and has greatly improved sewer bill collection. This is shown by the fact that the City of Charleston's billed revenue has increased by $203,375, or 4.7%, since 1990 while their accounts receivables have decreased by $302,070, or 44.7%, since 1990. The City of South Charleston's billed revenue has increased by $858,875, or 29.3%, since 1990 and their accounts receivables have decreased by $16,948, or 4.2%, since 1990. The termination of water service provides a process whereby money is immediately collectible as a result of such termination of service. The imposition of landlord liens provides a process by which the collection of money is in the distant future, if ever.

The Cities of Charleston and South Charleston will also lose much more revenue by the elimination of their late penalties than by the elimination of landlord liens. The City of South Charleston is currently not charging delayed payment penalties. The City of Charleston has recommended to the City Council that the delayed payment penalty be eliminated from its sewer bills. The 1993 Annual Report filed by the City of Charleston states that $76,872 was collected in late penalties. The City of Charleston does not keep records for final bills. However, using the final bill percentages provided by the City of South Charleston, and extrapolating those percentages to the City of Charleston, it is clear the City of Charleston would collect, at most, $11,462 as a result of placing liens upon rental property. The City of South Charleston, as previously noted, is not charging delayed payment penalties for delinquent bills. However, in using the delayed payment percentage for the City of Charleston and extrapolating that statistic to the billed revenues of the City of South Charleston, it is estimated that the City of South Charleston is losing approximately $64,160 in revenue by not collecting the late penalty. As stated in my initial affidavit, the City of Charleston will lose a maximum of $9,407 in revenues as a result of the elimination of landlord liens.

Finally, I will note that the Plaintiffs have stated in their affidavits filed with the Court that both the City of Charleston and the City of South Charleston consider a bill delinquent after 60 days. This is, however, irrelevant to the issue now before the Court. The Water Termination Agreements the parties have entered into with the West Virginia-American Water Company state that a bill must be unpaid for a period of not less than 60 days before the termination of water service can be instituted. Accordingly, the balances showing delinquent bills which are less than 60 days old do not reflect the full extent of the Cities' ability to collect delinquent accounts, i.e., the

balances do not reflect the threat of termination of water service if the bill is not paid.

Further the affiant sayeth not.

/s/ Birdie Gandy

Birdie Gandy, CPA

Taken, sworn to and subscribed before me the undersigned authority on this the 3rd day of December, 1993.

My commission expires January 11, 2001.

/s/ Creed Adkins